FILE COPY

MAR 24 1

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1931.

No. [redacted] 22

WASHINGTON FIDELITY NATIONAL INSURANCE COMPANY, A CORPORATION, PETITIONER,

vs.

WINNIE BURTON.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIÆ AND BRIEF IN SUPPORT THEREOF.

BENJAMIN S. MINOR,
H. PRESCOTT GATLEY,
ARTHUR P. DRURY,
Counsel for Metropolitan Life Insurance Company, The Prudential Insurance Company of America and the John Hancock Mutual Life Insurance Company, as Amici Curiæ.

SUBJECT INDEX.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIÆ.

	Page
Brief as amici curiæ:	
Preliminary statement	3– 5
Summary of facts involved	5– 7
Argument	5–15
I. Conflict with prior State decisions	5–12
II. The statute is clear and unambiguous and within the constitutional authority of Congress	12–14
III. Conclusion	14–15

TABLE OF CASES AND STATUTES.

Stipcich v. Insurance Co., 277 U. S. 311	4
Supreme Council v. Behrend, 247 U. S. 394	5, 13
Ritter v. Mut. Life Ins. Co., 169 U. S. 139	9
Bergholm v. Peoria Life Ins. Co., Adv. Op. Sup. Ct. U. S., Vol. 7, 306	10
Met. Life Ins. Co. v. Hawkins, 31 App. D. C. 493	7
Met. Life Ins. Co. v. Burch, 39 App. D. C. 397	7
Brotherhood of R. Trainmen v. Groves, 48 App. D. C. 151	7, 8
Mass. Life Asso. v. Robinson, 104 Ga. 256	8
Reagan v. Union Mut. Life Ins. Co., 189 Mass. 555	9
Continental Casualty Co. v. Owen, 38 Okla. 107	9
MacKinnon v. Mut. Fire Ins. Co., 89 Iowa 170	9
Kirkpatrick v. London Guar. & Accid. Co., Ltd., 139 Iowa 370	9
Wilcox v. Continental Ins. Co., 85 Wis. 193	9
Western & Southern Life Ins. Co. v. Webber, 183 Ky. 32	9
Connell v. Met. Life Ins. Co., 16 Pa. Superior Ct. Rep. 520	9, 10
Hood v. Prud. Ins. Co., 22 Pa. Superior Ct. Rep. 245	9
Panapoulous v. Met. Life Ins. Co., 96 Pa. Superior Ct. Rep. 325	9
Wash. Fire Relief Assn. v. Albro, 130 Wash. 114	9
Met. Life Ins. Co. v. Scott, Admr., 160 Miss. 537	9, 11
Moore v. Bestline, 23 Pa. Superior Ct. Rep. 6	11
Imperial Fire Ins. Co. v. Dunham, 117 Pa. 460	11
Rauen v. Prud. Ins. Co., 129 Iowa 725	11, 13
Code of Laws for D. C., Section 657	7

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931.

No.

WASHINGTON FIDELITY NATIONAL INSURANCE COMPANY, A CORPORATION, PETITIONER,

vs.

WINNIE BURTON.

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIÆ.

MAY IT PLEASE THE COURT:

The undersigned, as counsel for the Metropolitan Life Insurance Company, The Prudential Insurance Company of America and the John Hancock Mutual Life Insurance Company, respectfully move this Honorable Court for leave to file as *amici curiæ* the accompanying brief in support of the petition for writ of certiorari.

BENJAMIN S. MINOR,
H. PRESCOTT GATLEY,
ARTHUR P. DRURY,

Counsel for Metropolitan Life Insurance Company, The Prudential Insurance Company of America and the John Hancock Mutual Life Insurance Company, as Amici Curiæ.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No.

WASHINGTON FIDELITY NATIONAL INSURANCE COMPANY, A CORPORATION, PETITIONER,

vs.

WINNIE BURTON.

BRIEF OF METROPOLITAN LIFE INSURANCE COMPANY, THE PRUDENTIAL INSURANCE COMPANY OF AMERICA AND JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY, AS AMICI CURIÆ.

I.

Preliminary Statement.

Metropolitan Life Insurance Company, The Prudential Insurance Company of America and John Hancock Mutual Life Insurance Company are corporations doing a life insurance business in the District of Columbia, and are interested in the litigation involved in this case by reason of the fact that they have issued and there are now outstanding in the District of Columbia, approximately four hundred fifty thousand of what are termed "industrial" life insurance policies, involving more than eighty-two millions of dollars. These

policies contain the whole contract of insurance between the insurer and the insured and expressly so provide; but no copy of the application made by the insured, if any, was delivered with or is attached to any of such policies. And there is now pending in the Municipal Court of the District of Columbia a suit or suits based upon such a policy or policies, involving the same questions of law and the same, or similar, facts as those involved in this case, as to which the defendant company, because of failure to deliver with the policy sued on a copy of the written application therefor made by the insured, is, by the decision of the Court of Appeals of the District of Columbia in this case, construing Section 657 of the Code of Laws for said District, denied the right to make any defense therein based solely upon and available to it under the terms, stipulations and conditions of the policy itself.

The effect of this decision is to make every such policy incontestable from the date of its delivery to the insured, even in cases where the policy may have been obtained by fraud, or in cases where the insured, between the date of the application and the date of the policy or of its delivery, may have undergone a material change in his physical condition from sound to unsound health, of which he is aware, without disclosing such change to the Company as in duty bound so to do. (*Stipcich* v. *Insurance Co.*, 277 U. S., 311, 317.)

The sole question involved in this case is:

Does this statute prohibit a life insurance company doing business in the District of Columbia from making

any defense to a suit upon a policy, based solely upon the terms, and conditions of the policy, if no copy of an application therefor made by the insured is delivered with the policy?

The question here presented is one of substance relating to the construction of a statute of the United States, applicable to the District of Columbia, which, although presented to this Court in the case of *Supreme Council* v. *Behrend,* 247 U. S., 394, was not decided, and has not since been, but should be settled by this Court; and is an important question in the law of life insurance not only to a large number of life insurance companies doing business in the District of Columbia and in many of the States having similar statutes, but also to the many hundreds of thousands "industrial" policy holders in the District of Columbia by reason of increase in the expense of conducting the business of life insurance necessitated by this decision which in effect requires that such contracts of life insurance shall be evidenced by two documents,—the policy and a copy of the application therefor, notwithstanding the policy itself contains the whole contract of insurance between the parties.

II.

ARGUMENT.

The Decision Below is Contrary to and in Conflict With Prior State Decisions.

The record shows that the petitioner, without delivering a copy of the application made by the insured,

issued its policy of life insurance, dated December 12, 1927, which itself contains all the terms, stipulations and conditions of the contract of insurance between the parties, including a provision that "this policy constitutes the entire agreement between the Company and the Insured and the Holder and Owner hereof. Its terms cannot be changed, or its conditions varied, except by the express agreement of the Company evidenced by the signature of its President or Secretary." The policy contains no reference to an application therefor as part of the contract of insurance or as having any bearing thereon; nor are there any endorsements on the policy with respect to changing its terms or varying the conditions therein contained.

The policy involved in this case contains the provision that "If, (1) the insured is not alive or is not in sound health on the date hereof; * * * then in any such case, the Company may declare this policy void and the liability of the Company, in the case of any such declaration or in the case of any claim under this policy, shall be limited to the return of premiums paid on the policy, except in the case of fraud, in which case all premiums will be forfeited to the Company."

The defendant below offered proof that the insured was not in sound health at or before the issuance of the policy, and such proof was rejected because a copy of the application had not been attached to and delivered with the policy.

This ruling was based upon Section 657 of the Code of Laws for the District of Columbia, which provides that:

> "Each life insurance company, benefit order and association doing a life insurance business in the District of Columbia shall deliver with each policy issued by it a copy of the application made by the insured so that the whole contract may appear in said application and policy, in default of which no defense shall be allowed to such policy on account of anything contained in, or omitted from, such application."

In its interpretation of this statute, the prior decisions of the Court of Appeals of the District of Columbia are in harmony with the decisions of the State Courts, construing similar statutes, in holding that the penalty imposed by the statute applies to an action on a policy of life insurance where a full copy of the application is not delivered with the policy and the defense is based upon the falsity of some statement, representation or warranty contained in the application. (*Met. Life Ins. Co.* v. *Hawkins,* 31 App. D. C., 493-496; *Met. Life Ins. Co.* v. *Burch,* 39 App. D. C., 397-405; *Brotherhood of R. Trainmen* v. *Groves,* 48 App. D. C., 151.) But with respect to the question here involved its decision in this case is not only contrary to and in conflict with prior decisions of the State Courts which have considered and passed upon this question; but, in interpreting the statute as requiring the contract of insurance to be evidenced by two documents,—the policy and a copy of the application therefor,—notwithstanding the policy sued on embodies the contract in its entirety and was so accepted without objection by the insured, the decision would seem to be contrary to and in conflict with its prior decision in

Brotherhood of R. Trainmen v. *Groves, supra,* 154, wherein the Court, in not permitting a defense based upon the constitution, by-laws, rules and regulations of the insurer, which by reference in the policy were made a part of the contract of insurance without delivering copies thereof with the policy, says:

> "The manifest purpose of Congress in adopting it (Sec. 657) was to compel insurance companies, whether old line or fraternal, to state the entire contract *either in the policy or the policy and application,* so that the insured would be able to find the terms defining his obligations and rights as a policy holder in not more than two papers. But for this provision he might be compelled to search through upwards of a hundred pages of printed rules and regulations, most of which had no bearing whatever upon his rights, to ascertain the complete terms of his contract" (Italics ours).

The effect of the decision in this case is to make, contrary to public policy, every such policy as herein involved incontestable from its date and thereby preclude the insurer company from making any defense whether based upon fraud in the procurement of the policy or otherwise, or for breach of condition as to sound health on the date of the policy, or for breach of other conditions contained in the policy itself, upon the existence of which the validity of the policy is dependent.

The Court in the case of *Mass. Life Asso.* v. *Robinson,* 104 Ga., 256, 271, says:

> "If, however, the policy stipulated that it should be incontestable from its date, and the

> insurer should not be allowed any defenses, whether originating in fraud or otherwise; or if it were clear from the terms of the contract that it was the intention of the parties that fraud should not be a defense, then such a contract would be void as against public policy."

The decision in the above quoted case is cited with approval in *Reagan* v. *Union Mut. Life Ins. Co.*, 189 Mass., 555, 557; and *Continental Casualty Co.* v. *Owen*, 38 Okla., 107, 121. See also *Ritter* v. *Mut. Life Ins. Co.*, 169 U. S., 139, 154.

In a number of State decisions, it is held that such statutes do not prevent the insurer from showing that the insured was not in sound health when the policy was delivered, or from showing breach of other conditions contained in the policy. (*MacKinnon* v. *Mut. Fire Ins. Co.*, 89 Ia., 170, 174; *Kirkpatrick* v. *London Guar. & Accid. Co. Ltd.*, 139 Ia., 370, 375; *Wilcox* v. *Continental Ins. Co.*, 85 Wis., 193, 198; *Western & Southern Life Ins. Co.* v. *Webber*, 183 Ky., 32, 38; *Connell* v. *Met. Life Ins. Co.*, 16 Pa. Superior Ct. Rep., 520, 529; *Hood* v. *Prud. Ins. Co.*, 22 Pa. Superior Ct. Rep., 245, 249; *Panapoulous* v. *Met. Life Ins. Co.*, 96 Pa. Superior Ct. Rep., 325, 328-9; *Wash. Fire Relief Assn.* v. *Albro*, 130 Wash., 114, 116; *Met. Life Ins. Co.* v. *Scott, Admr.*, 160 Miss., 537, 545.)

The language of the above quoted provision of the policy, upon which the defense in this case is based, is clear and free from ambiguity. It requires the existence of sound health on the date of the policy as a condition precedent to the validity of the contract of insurance. To relieve the insured from the legal con-

sequences of this explicit condition of the policy by precluding the Company from *making the defenses sought to be made in this case* "would be to vary the plain terms of a contract in utter disregard of long settled principles." (*Bergholm* v. *Peoria Life Ins. Co.*, Adv. Op., Sup. Ct., U. S., Vol. 7, 306, 308.)

In the case of *Connell* v. *Met. Life Ins. Co., supra,* at page 529, the Court says:

> "It must not be forgotten, however, there is a difference between obtaining a contract through a misrepresentation as to a fact, and making the existence of that fact a condition upon which the contract, by its terms, is dependent.
>
> "The insurance company having, by its express contract, waived the warranties contained in the application, sought to protect itself by incorporating certain conditions into the contract. A part of the agreement between the parties was, 'This policy is void if the insured before its date has been rejected for insurance by this or any other company, or has been attended by a physician for any serious disease or complaint, or has had before this date any pulmonary disease, or chronic bronchitis, or cancer, or disease of the heart, liver or kidneys.' These were unequivocal absolute covenants. Whether the policy was void was dependent upon actual conditions, past or present, and not upon the knowledge of those conditions possessed by the parties. The Act of June 23, 1885, relates 'to warranties in the applications for life insurance policies' and has not application to the express covenants of the policy itself, not directly dependent upon such warranties. The defense in this action was that the assured, prior to and

> at the time of the issuance of the policy, had Bright's disease of the kidneys, and that she continued to suffer from and died of that disease. If this was true, the express covenant of the parties, hereinbefore recited, cannot be disregarded, and the policy was void" (Cases).

And the law seems to be settled by the decisions construing somewhat similar statutes that, for failure to deliver with the policy a copy of the application, the case is to be considered and disposed of as if no such paper existed. (*Moore* v. *Bestline,* 23 Pa. Superior Ct. Rep., 6, 12; *Imperial Fire Ins. Co.* v. *Dunham,* 117 Pa. 460, 473; *Rauen* v. *Prud. Ins. Co.,* 129 Ia., 725, 731.)

The Mississippi statute (Sec. 5174, Code of 1930) provides that for default in the delivery of a copy of the application with the policy, the life insurance company "shall not be permitted in any Court of this State to deny that any of the statements in said application are true." The Supreme Court of Mississippi in construing this statute in the case of *Met. Life Ins. Co.* v. *Scott, Admr., supra,* at page 545, which involved substantially the same questions of law based upon substantially the same facts as are involved in this case, says:

> "The policy was complete in itself, and purports to contain in plain language all the terms, conditions and stipulations of the contract, and we do not think the Company is precluded from relying on the express conditions and stipulations appearing on the face of the policy, by reason of the fact that the application contained representations or stipulations in reference to

the same subject matter. When the Company chose to ignore the statements and representations appearing in the application, and incorporated in the policy in plain terms the conditions and stipulations upon which its validity should rest, and the policy was accepted by the insured as constituting a contract, it had the right to make any defense it might have under the terms of the policy, without reference to the application."

III.

The Statute is Clear and Unambiguous and Within the Constitutional Authority of Congress.

Prior to the enactment of this statute, the terms, stipulations and conditions of the entire contract of insurance were usually contained in the policy and in the application of the insured; and the rule established by the decisions permitted an insurance company in a suit on a policy issued by it to rely upon the written application made for the policy, or upon some by-law, constitution, rule or regulation of the company, forming a part of the contract of insurance or having some bearing thereon, without incorporating in, attaching to, or delivering with the policy a copy or copies thereof.

Obviously the purpose of this and similar State statutes, and the manifest intention of Congress in the enactment of the statute for the District of Columbia, was to change this rule and thereby to prevent the insured and others interested in the policy from being taken by surprise and being bound by something contained in the application, or other documents, forming

by reference a part of the contract of insurance, but not placed in the possession of the insured. (*Supreme Council* v. *Behrend*, 45 App. D. C., 260, 270 and 275; *Western & Southern Life Ins. Co., supra*, 35; *Rauen* v. *Prud. Ins. Co., supra*, 732.)

There is no requirement in the statute respecting the mode or manner in which contracts of life insurance shall be made; nor is there any prohibition against the whole of such a contract being embodied in the policy itself. Nevertheless, the Court of Appeals in this case interprets the statute as requiring that the "whole contract" may not be contained in the policy, but that it must be contained in the policy *and* in the application made by the insured, otherwise the insurer is without defense to a claim.

The duty imposed on the Company by this statute is to deliver into the possession of the insured the written evidence of the contract "so that the whole contract may appear," with a penalty for default in the performance of this duty by the Company. Therefore, if the policy as issued by the Company and accepted by the insured contains, without reference to the application or to any other document as forming a part thereof or having any bearing thereon, the "whole contract" of insurance between the parties, the duty imposed upon the Company has been complied with and the statute has no application. In such case, delivery with the policy of a copy of the application or of any other document would serve no purpose and would be an unnecessary and useless thing.

The default specified in the statute for which the penalty is imposed is the failure on the part of the Com-

pany to deliver to the insured written evidence of the "whole contract" of insurance, including a copy of the application where it forms a part thereof. The penalty for such default is limited to a denial to the Company to make any defense to the policy based upon "anything contained in or omitted from the application," but where the application forms no part of the contract which is contained in its entirety in the policy, and accepted by the insured, then there is no reason, or justification under the statute, for imposing the penalty. Moreover, the penalty does not apply in this case, for the defense sought to be made was not "on account of anything contained in or omitted from such application," but was based *solely and exclusively upon the terms and conditions of the policy itself without reference to any application.*

Conclusion.

It is respectfully submitted that in this case the Court of Appeals of the District of Columbia erred in its application and interpretation of Section 657 of the Code of Law for the District of Columbia, since

(*a*) the purpose of Congress in the enactment of this Statute was satisfied by placing before the insured in the policy itself the entire contract of insurance, and

(*b*) the defense offered by the insurance company in this case was not a defense "on account of anything contained in, or omitted from" the application of the insured.

Therefore, neither the intent nor the letter of the Statute requires the rejection of the proof offered by

the insurance company in the defense of the claim in suit.

Wherefore, the undersigned, as Amici Curiæ, on behalf of the Metropolitan Life Insurance Company, The Prudential Insurance Company of America and the John Hancock Mutual Life Insurance Company, respectfully pray that this Court will grant the writ of certiorari herein prayed for by petitioner, to the end that this case may be reviewed and determined by this Court, as provided by law; and that the judgment herein of the Court of Appeals of the District of Columbia be reversed by this Honorable Court.

Respectfully submitted:

BENJAMIN S. MINOR,
H. PRESCOTT GATLEY,
ARTHUR P. DRURY,

Counsel for Metropolitan Life Insurance Company, The Prudential Insurance Company of America and John Hancock Mutual Life Insurance Company, as Amici Curiæ.